(1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NORMAN DePLUZER,

Petitioner,

v.

THE VILLAGE OF WINNETKA,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

Whether the Illinois Appellate Court's unexpected decision directing that Summary Judgment be entered against the Plaintiff and reversing the findings of the trial court which held that there was an issue of fact for trial as to whether the Defendant terminated the employment of the Plaintiff in its electrical generating facility because the Plaintiff filed a workers compensation claim naming the Plaintiff as respondent, was in violation of the Plaintiff's procedural due process rights and right to trial by requiring plaintiff to prove his cause in a separate proceeding.

LIST OF PARTIES

The parties to the proceedings below were the petitioner-plaintiff NORMAN DEPLUZER, and the respondent-defendant VILLAGE OF WINNETKA, represented by James A. Clark, Joseph A. Cancila, Jr., and Lisa C. Leib, of the law firm of Schiff Hardin and Waite, Chicago, Illinois.

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OCTOBER TERM, 1994

NORMAN DePLUZER,

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On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

The petitioner NORMAN DEPLUZER respectfully prays that a writ of certiorari issue to review the orders and opinion of the Illinois Supreme Court affirming the Illinois Appellate Court, First District, Fifth Division, entered in the above-entitled proceedings on December 6, 1994.

The defendant alleged in part as a defense to a retaliatory discharge claim relying upon the argument and federal district court decisions that the plaintiff would have been fired based upon alleged falsification of certain job application responses.[1]

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[1] The decision of *McKennon v. Nashville Banner Publishing Company*, No. 93-1543, 1995 U.S. Lexis 699; 63 U.S.L.W. 4104 effectively reversed the authority upon which Winnetka's defense was based.

The Illinois Appellate Court directed the entry of an order granting summary judgment against the plaintiff on its own evaluation of evidence and upon a suit involving the granting of a directed verdict.

OPINIONS BELOW

The decision of the Illinois Supreme Court denying Plaintiff's Petition for Leave to Appeal, p. 14a and opinion of the Illinois Appellate Court, First District, Fifth Division, is reprinted in the appendix hereto, p. 1a, along with the denial of Plaintiff's motion for rehearing, p. 13a.

JURISDICTION

The order of the Illinois Supreme Court was entered on December 6, 1994 denying Plaintiff's Petition for Leave to Appeal from the Illinois Appellate Court's decision from which this petition is taken.

The jurisdiction of this Court to review the order of the Illinois Supreme Court is invoked under United States Supreme Court Rule 13.1 and 28 USC sec. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Amendment 14

"nor shall any State deprive any person of life, liberty, or property with due process of law."

Illinois State Constitution, Article I

Section 2

Due Process.

Section 13

"Right to a jury trial"

OTHER

Illinois Supreme Court Rules

304 (a)

"If . . . multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal."

Illinois Code of Civil Procedure

2-1009

"The plaintiff may at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause."

STATEMENT OF THE CASE

Norman Depluzer, Plaintiff, filed the two count action against the Village of Winnetka, Defendant-Appellant alleging in Count I, a breach of contract action, and in Count II, a retaliatory discharge action alleging termination because he had filed a workers compensation claim under the Illinois Workers Compensation Act. Plaintiff's employment was terminated on September 2, 1986 by the Defendant ostensibly for misconduct. Plaintiff stated that he refused to follow an order because such order caused additional harm based upon experience and a treating physician's written advice. Plaintiff was diagnosed as suffering a permanent partial hearing loss in both ears connected with his employment in an electricity generating facility operated by the Defendant. (C2).

Defendant filed pretrial motions for Summary Judgment on both counts of the Complaint. The Trial Court granted the Defendant's motion with regard to the contract claim in Count I of the Complaint, finding that defendant was not liable on the contract because plaintiff had made certain misstatements on the application for employment made some years before about facts that were in dispute. The Trial Court denied the Defendant's motion with regard to the retaliatory claim, finding a disputed fact at issue with regard to the facts and circumstances of the termination of the plaintiff. Plaintiff then presented his Motion for Voluntary Dismissal under Illinois Supreme Court Rule 2-1009 and such was granted by the Court.

Subsequently Defendant moved for reconsideration of the denial of its motion for summary judgment on the retaliatory discharge claim. The motion was based in part on the argument that a misstatement that would shield it from liability on contract also shielded it from liability

on retaliatory discharge. (Defendant's Brief, pp. 3-11). The motion was denied. Plaintiff moved for reconsideration on the granting of summary judgment on the contract issue, and was denied.

Defendant filed its appeal from the denial of its motion for summary judgment and Plaintiff asked for review of the granting of summary judgment on the contract claim on a cross appeal.

Plaintiff attacked the Defendant's appeal arguing that the appeal was not properly before the Appellate Court. Plaintiff alleged that the Defendant was attempting to appeal directly from the interlocutory order that denied the Defendant's motion for summary judgment. (Plaintiff's Motion to Dismiss Appeal.) Plaintiff argued that the Defendant failed to support its appellate jurisdictional statement with direct reference to Illinois Supreme Court rules for appeal from an interlocutory order and that in failing to raise any issue with the trial court's granting of Plaintiff's motion for voluntary dismissal it therefore acknowledged that the voluntary dismissal was proper and waived any argument that the Defendant may have to the contrary. (*Id.*) Plaintiff argued further that the Defendant was not entitled to prevail on its appeal because it had no basis in fact to allege that the Motion for Voluntary Dismissal was incorrect and therefore that the review of the denial of a motion for summary judgment was not proper. (*Id.*)

The Appellate Court took the Plaintiff's Motion to Dismiss with the case and decided both the appeal and the motion after oral argument. The Appellate Court found that the order denying the Defendant's motion for summary judgment on the retaliatory discharge claim contained no 304(a) language requiring that a trial judge make

an explicit finding that there is a final and appealable order but that there was a final and appealable order created by the granting of voluntary dismissal without prejudice. (Decision, pp. 4a-5a)

The Appellate Court found that the deposition and circumstances as a whole failed to support Defendant's allegation that the Plaintiff made an intentional misrepresentation on the employment application (Decision, pp. 7a-10a) but that the record failed to support the allegation of breach of contract. Further, relative to the retaliatory discharge claim, the Appellate Court, relying on *Miller v. J.M. Jones Co.* (1992), 225 Ill. App. 2d 799, 803, 587 N.E.2d 654, held that summary judgment should be granted against the Plaintiff. Plaintiff filed a Petition for Rehearing that was denied on September 1, 1994.

In his motion for reconsideration, Plaintiff argued summary judgment was not proper because facts were in dispute and acknowledged by the Defendant. The Trial Court denied Defendant's motion for summary judgment on the retaliatory discharge count because there was an issue created as to whether the intent of the defendant was to punish the plaintiff for filing a claim for hearing loss. The Trial Court held that after examining the totality of the facts the motion presented by the Defendant did not put before the court the issue of whether Plaintiff was unjustified in refusing to wear both ear plugs and ear muffs although it was apparent to the Trial Court from the pleadings that this was a contested issue of fact for trial. (See Brief of Defendant, Exhibit C, Transcript of Proceedings, p. 32, lines 12-24, and p. 33, lines 1-24; p. 34, lines 1-24) The Trial Court held that the Plaintiff had successfully pleaded a *prima facie* case for retaliatory discharge and that the motion for summary judgment was not proper. (*Id.*) Defendant had even attached numerous

exhibits that were used in the motion before the Trial Court to its brief on appeal. These included the following:

> Exhibit B, Depluzer's memoranda to the Defendant indicating unhealthy conditions within the Electric Power Plant, dated January 7, 1986.
>
> Exhibit C, the doctor's statement documenting the plaintiff's condition of hearing loss, dated August 8, 1986.
>
> Exhibit D, Form 47, Employers First Report of Injury or Illness, Illinois Industrial Commission, dated August 12, 1986.
>
> Exhibit E, Letter to plaintiff from the Defendant, dated August 18, referring specifically to the claim made by the plaintiff on August 12, 1986, and specifically to the form referred to above.

Summary Judgment therefore wrongfully denied the plaintiff of his right to trial under the United States Constitution and the Illinois Constitution because it was granted outside the scope of the authority of the court to grant such a motion as the decision is articulated and unconstitutionally denies the plaintiff the opportunity to present evidence at trial.

REASONS FOR GRANTING THE WRIT

The Appellate Court's decision effectively unlawfully deprives the plaintiff of his right to trial in violation of the due process protections of Amendment 14 of the United States Constitution and under Sections 2 and 13 of the Illinois State Constitution.

A. The Appellate Court Denied The Plaintiff Of His Right To Procedural Due Process Through Its Construction & Application Of The *Miller* Decision.

The granting of summary judgment to the defendant is in violation of the plaintiff's procedural due process rights. The Illinois Appellate Court's unexpected insistence that the plaintiff try the merits of his claim during a separate summary judgment proceeding denied plaintiff of his rights to procedural due process. (See *Mitchell v. Graves*, 612 N.E. 2d 149 (Ind. App. 1 Dist. 1993; *see also Diamond Mortgage Corp. of Illinois v. Armstrong* (1988), 176 Ill. App. 3d 64, 125 Ill. Dec. 632, 530 N.E.2d 1041 (Ill.App.1 Dist.); *Pines v. Pines*, 262 Ill.App.3d 923, 200 Ill.Dec. 647, 635 N.E.2d 986 (Ill.App.Ct., 1 Dist, 4 Div. 1994)).

It was the Appellate Court and not the trial court that made the error in procedure when the Appellate Court assessed the veracity of the individuals and other evidence. The Appellate Court's decision is based upon such evidence and applies *Miller v. J.M. Jones Co.* (1992), 225 Ill.App.3d 799, 587 N.E.2d 654. As argued above, the *Miller* decision involves the plaintiff's burden or proof *at trial.* The Illinois Appellate Court however applied the decision in a manner in which all plaintiffs are effectively deprived of the right to trial of their cause in retaliatory discharge actions if they do not prove their case prior to trial. In Illinois the Plaintiff need only allege sufficient facts to state a cause of action. The defendant acknowledged the issues, facts and basis of the dispute, and the Appellate Court ruled on the credibility of the plaintiff in the allegations contained in his complaint in its order to grant summary judgment. There are no facts alleged by the defendant however that would indicate that the plaintiff alleged anything other than what he believed to be true.

B. Once Plaintiff Established His Retaliatory Discharge Claim And Alleged A Wrongful Intent In The Termination Of Employment, The Issue Of Intent Was One For Trial And Not Summary Judgment.

Miller provides that the plaintiff in order to establish a prima facie case for retaliatory discharge the plaintiff must allege: 1.) That plaintiff was an employee before he received injury; 2.) That he exercised his rights in accordance with the Act; 3.) That he was discharged and that the discharge was causally related to the exercise of his rights. (Decision at p. 13; citing *Miller*, at 803).

In light of the foregoing, the Winnetka's action terminating the Plaintiff was connected by not less than three circumstances all of which appear plainly in the Defendant's Brief on Appeal:

> 1.) the complaint by the plaintiff of the excessive noise and documented hearing problem;
>
> 2.) the Defendant's acknowledgment of the filing of the Industrial Commission's Form 45: Employers First Report of Injury or Illness on August 12, 1986 in its memorandum dated August 18, 1986; and
>
> 3.) the actual Form 45 which was to be filed in the Illinois Industrial Commission.

These activities relative to the completion of Form 45 occurred only three (3) weeks prior to termination. During those three weeks the Defendant's Brief clearly reveals that Depluzer's allegation of intent to terminate because he is pursuing steps to perfect his worker's compensation is established by the following additional allegations: a). Discussion with a supervisor, Tom Stover, regarding hearing loss and Depluzer's intent to file a claim. (Brief, p. 24.); b). Increasing animosity by the Defendant directed toward Depluzer following the announcement of the intent to pursue the claim by shift engineers. (*Id.*)

The Plaintiff alleged in his complaint that he gave prompt notice of injury to his employer by reporting his job related injury to his supervisor and by filing an injury report with the employer. (Plaintiff's Amended Complaint, Count II, para. 47-49). Further the Amended Complaint states that Plaintiff was fired as a result of his pursuit of the claim. (Id. at para. 53.) The facts are that Plaintiff was an employee, he was injured during the course of his employ, he notified the defendant of the nature and cause of the injury, he provided medical information regarding the injury, he completed necessary forms with the help of supervisory personnel, he has alleged increasing disparaging treatment approximate in time to the pursuit of claim and he was discharged on the afternoon he filed the claim in the Industrial Commission. All of these facts alleged by the Plaintiff are referenced by the Defendant and explicitly contained in its Appellate Brief on page 24. Whether these are true should be a matter for trial and not summary judgment.

C. The Miller Case Involved The Granting Of Defendant's Motion For Directed Verdict, Not A Motion For Summary Judgment.

The *Miller* court held that the granting of any motion to dismiss a retaliatory discharge cause before trial required that all reasonable inferences from the complaint be regarded as true. (*Miller*, at 658.) Defendant in *Miller* articulated a legitimate reason for discharging plaintiff, i.e., that plaintiff *simply could not do the work* based upon a medical reason supplied by the plaintiff himself, and because the plaintiff made it clear that he was uninterested in lighter work available *during trial*. (*Miller*, at 660-661.) Evidence of the foregoing was a fact introduced at trial during plaintiff's case in chief. (*Id.*) The

Miller court held that the plaintiff had the burden to prove that the articulated lawful reason for discharge was pretextual, noting further that a medical inability to work is a legitimate nondiscriminatory reason for discharge when the legitimate reason was raised during plaintiff's proofs at trial. (*Miller* at 658 and 660.) The directed verdict was granted after plaintiff failed to address the employer's articulated reason at the close of plaintiff's *case in chief, not summary judgment.* This is distinguishable from *Depluzer.* In *Depluzer,* the reason for discharge was not medical *inability* but a disability that could and should have been accommodated easily.

Miller did not shift the burden of proof to the plaintiff before trial. The allegation in *Depluzer,* acknowledged by defendant, is that the Defendant intended to retaliate against Depluzer for his activities in pursuit of the worker's compensation claim. The issue is that of intent, not of inability or reassignment, and such evidence of this as the true nature of the controversy is evident on the face of Defendant's Brief.

Close reading of the *Miller* decision reveals that it is not proper to grant summary judgment on the issue of intent. (See Miller at pp. 658-659.) The issue of intent and the Plaintiff's obligation to refute an articulated nondiscriminatory reason for discharge raised by the Defendant employer is *at trial.* On a motion for directed verdict, the trier of fact can evaluate the evidence, make inferences and assess credibility. Failure to refute such articulated nondiscriminatory reasons at trial therefore can properly be the basis for the granting of an employer's motion for directed verdict.

There is no basis to expand the *Miller* decision to summary judgment motions. The parties are not under the

same burden. The motion for summary judgment on the part of the Defendant is distinguishable in context from *Miller* on the basis both of law and fact. Presumptions in favor of the plaintiff during a motion and of the defendant do not operate to alleviate them from their burden of proof in trial. At trial the plaintiff has an affirmative burden to present evidence addressing an articulated nondiscriminatory reason for termination. Before trial, the plaintiff has the burden to plead sufficient facts to make out notice pleadings for the prima facie case. Before trial, an articulated reason is a fact in dispute. *Miller* does not stand for the shifting of the legal burden of proof by the plaintiff from trial to pretrial. The Appellate Court therefore has deprived the plaintiff of his right to trial and thereby violated his procedural due process rights. Application of *Miller* is unanticipated and incorrect and results in a denial of due process to the plaintiff.

D. The Claim Should Not Be Dismissed Based Solely Upon Employer's Articulation Of A Contested Lawful Reason For Discharge.

The articulation of a lawful reason for discharge is insufficient to grant a motion to dismiss. *Miller* held that at that stage, the allegations of the complaint and all reasonable inferences therefrom must be regarded as true. (*Miller* at 658.) The issue of employer's motive or intent is a question of material fact not normally subject to summary judgment. (*Miller*, at 658, citing, *Palmateer v. International Harvester Co.* (1986), 140 Ill. App.3d 857, 860, 95 Ill. Dec. 253, 255, 489 N.E.2d 474, 476.)

E. According To Miller, The Issue Of Pretext Is One Of Intent And Not A Basis For The Granting Of A Defendant's Summary Judgment Motion In A Wrongful Discharge Case.

Intent of employer is a question of fact and an important factor against the granting of a motion for summary judgment.

The *Miller* court had the opportunity to evaluate the disposal of a retaliatory discharge claim via summary judgment, although the *Miller* appeal itself arose from the trial court's granting of defendant's motion for a directed verdict after the presentation of plaintiff's case in chief. In its decision, the court touched upon aspects of the *Miller* case directly applicable to Depluzer, particularly with regard to the use of affidavits, their weight and evaluation of such affidavits in the context of the retaliatory discharge action. This is not simply a case where Depluzer was terminated on the date of the filing of his worker's compensation claim as a matter of mere coincidence, but rather that the Village had full knowledge of not only Depluzer's intention to file the claim against the Village, but of the direct actions and activities that Depluzer took to avail himself of his rights under the Act.

Affidavits, while probative and relevant to the issue of intent, must be taken into consideration in the context of the matter as a whole, including the complaint, pleadings and in view of the facts presented when the issues arise in a motion for summary judgment. (See *Miller*, at 658.) Here the Defendant submitted three exhibits as part of a group exhibit included in it's brief that indicate that prior knowledge of Depluzer's intent to file a worker's compensation claim against the Defendant for injury to his hearing was a fact albeit a contested fact to be considered in light of his termination, when taken in the con-

text of the allegations of the Plaintiff. These exhibits tend to contradict the assertion of the Defendant's lack of prior knowledge and sustain the issue of fact found earlier by the trial court.

F. Defendant Failed To Raise Or Argue Error Related To The Voluntary Dismissal, And Therefore Was Not Entitled To Allege Error With The Interlocutory Order That Denied Its Motion For Summary Judgment.

Finally, the Defendant's appeal was calculated to reach an interlocutory order that it could not appeal under the Illinois Code of Civil Procedure. Illinois Supreme Court Rule 304. The Village alleged no exception to Rule 304. While it relied upon the order granting Plaintiff's motion for voluntary dismissal, it never once argued that the granting of the motion was in error, which in fact there was no factual basis to allege error. While the Court has established that the Defendant may appeal a final and appealable order or an interlocutory order that meets a specified exception, the Defendant failed to plead any exception and went directly to argue the interlocutory order denying the motion for summary judgment. *Kahle v. John Deere Co.* (1984), 104 Ill. 2d 302, 472 N.E. 2d 787. In *Kahle*, the issue is not whether the appeal could be made, but that the issue must be raised. The mere statement of an issue without support of argument amounts to waiver of an issue on appeal. *Stach v. Sears Roebuck & Co.*, (1981), 57 Ill.Dec. 879, 429 N.E.2d 1242, 102 Ill.App. 3d 397. Plaintiff contends that the appeal failed to allege proper jurisdiction and should have been dismissed.

CONCLUSION

For each of the foregoing reasons, Petitioner asks that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Appellate Court of Illinois
First District—Fifth Division
No. 1-93-1430—Filed June 30, 1994

NORMAN DePLUZER,

Plaintiff-Appellee and Cross-Appellant,

v.

VILLAGE OF WINNETKA,

Defendant-Appellant and Cross-Appellee.

Appeal from the Circuit Court of Cook County.
Honorable Anthony J. Bosco, Judge Presiding.

PRESIDING JUSTICE MURRAY delivered the opinion of the court:

The Village of Winnetka (Village) appeals and Norman DePluzer (DePluzer) cross-appeals from an order of the circuit court which granted the Village's motion for summary judgment in its favor with respect to count I of DePluzer's amended complaint (a breach of employment contract claim), but denied the Village's motion for summary judgment with respect to count II of the amended complaint (a retaliatory discharge claim) and then granted DePluzer's motion for voluntary dismissal of that count. For reasons we shall discuss, we affirm in part and reverse in part.

In May 1983, DePluzer applied for a maintenance position with the Village of Winnetka. DePluzer completed the Village's employment application form, providing his

employment history and background. In June 1983 DePluzer was hired as a helper in the Village's utility department. He later was promoted to the position of "fireman," to work in the boiler room of the Village's electrical generating plant.

In August 1986, DePluzer notified his supervisor that he had a note from his physician indicating that he was suffering from progressive hearing loss and should not be exposed to loud noises in his work environment. Based upon this information, DePluzer and his supervisor completed an injury report on August 12, 1986.

In response to the injury report, the Village's plant superintendent, Fred Roberts, sent DePluzer a memorandum instructing him to protect his hearing by wearing, simultaneously, both types of hearing protection devices supplied to him by the Village, *i.e.*, ear plugs and ear muffs, whenever he was in the power plant during working hours. DePluzer, however, refused to wear the two devices simultaneously, claiming that his caused him discomfort.

On August 18, 1986, upon learning that DePluzer was refusing to wear ear muffs in addition to ear plugs, in disregard of the directive contained in his memo, Roberts suspended DePluzer for one day. After this first suspension DePluzer returned to work, but continued to disobey the directive to wear the two devices simultaneously. Consequently, he was suspended again, this time for three days, and given a memorandum informing him that his continued refusal to comply with the safety directive would result in his dismissal.

On the morning of September 2, 1986, DePluzer filed a workers' compensation claim (form dated August 27, 1986,) with the Illinois Industrial Commission. On the

afternoon of September 2, 1986, DePluzer was discharged from his employment with the Village. When discharged, DePluzer was give a written termination notice which indicated that his termination was the result of his consistent failure to wear hearing protection equipment as directed.

On September 1, 1987, DePluzer filed a two-count complaint against the Village, alleging that he had been wrongfully and retaliatorily discharged due to the fact that he had voiced complaints regarding working conditions. The complaint was later amended on April 26, 1988. In the amended complaint, count I alleged a breach of the employment contract as set forth in the employees' handbook regarding grievances. Count II, which again alleged retaliatory discharge, now claimed that DePluzer had been discharged as a result of his exercise of his rights under the Illinois Workers' Compensation Act (Act).

After a plethora of filings, amended filings, motions, counter-motions and responses and after a mountain of discovery materials were requested, produced, submitted, and objected to, the Village filed a motion for summary judgment and DePluzer filed an emergency motion for voluntary dismissal without prejudice. Hearing was held on both of these motions on February 24, 1993, at which time the trial court entered an order which granted summary judgment in the Village's favor on count I of the amended complaint (breach of employment contract claim), denied summary judgment to the Village on count II of the complaint (retaliatory discharge claim) and granted DePluzer's request for voluntary dismissal as to count II only. Motions to reconsider were filed by both parties and were denied on April 5, 1993. The Village appealed and DePluzer cross-appealed.

Before addressing the merits of the appeal and cross-appeal, we must first address a motion to dismiss for lack

of appellate jurisdiction, which DePluzer filed with this court on November 24, 1993. Objections to the motion were filed by the Village, DePluzer filed a motion to reply to the Village's objections and the Village objected to DePluzer's motion to reply to their objections. The Village characterizes the motion to dismiss as "frivolous" and suggests that this court impose sanctions against DePluzer in the form of costs and fees. This court decided to consider the entire matter with the case.

In DePluzer's motion to dismiss the Village's appeal, DePluzer contends that the order appealed from is not a final order. We note, however, that if the order appealed from is not a final order, we would be obliged to dismiss not only the Village's appeal, but DePluzer's cross-appeal, as well, since they both appealed from the same order. Nevertheless, we shall consider the finality of the order appealed from.

It is axiomatic that this court has jurisdiction of only final orders. If the order appealed from does not dispose of the entire controversy as to all the parties or leaves any claims unresolved, then the order is not final, unless the trial court enters a finding that there is "not just cause to delay enforcement or appeal." (Ill. Rev. Stat. 1991, ch. 110A, par. 304(a).) This language, set forth in Illinois Supreme Court Rule 304(a), transforms an otherwise nonfinal order into a final and appealable one. Judges in Cook County are notorious for their willingness to enter such a finding. Why the attorneys in this case, who seem so adept at filing motions, neglected to request that such a finding be included in this order, in order to dispel any doubt as to finality of the order, is rather surprising.

In any event, as stated earlier, the finding is unnecessary if the order is final. In the present case the order appealed from granted summary judgment as to count I,

denied summary judgment as to count II and granted DePluzer leave to voluntarily dismiss count II without prejudice. DePluzer argues that the Village's appeal of the trial court's decision to deny summary judgment on count II must be dismissed because the denial of a motion for summary judgment is not a final order.

Although DePluzer is correct that the denial of a motion for summary judgment is typically not appealable, the propriety of the denial may be considered if the case is properly before a reviewing court from a final judgment and no trial or hearing has been conducted. (*Regnery v. Regnery* (1991), 211 Ill. App. 3d 607, 613, 570 N.E.2d 557.) In this case the order is final and appealable because, in addition to denying summary judgment, the trial court granted DePluzer's motion to voluntarily dismiss this count, making the order final and appealable.

Our Illinois Supreme Court has determined that it is important that a defendant have the ability to appeal from an order of voluntary dismissal since, otherwise, such an order would never be subject to review. (*Swisher v. Duffy* (1987), 117 Ill. 2d 376, 512 N.E.2d 1207; *Dillie v. Bisby* (1985), 106 Ill. 2d 487, 478 N.E.2d 1338; *Kahle v. John Deere Co.* (1984), 104 Ill. 2d 302, 472 N.E.2d 787.) Consequently, the order granting DePluzer a voluntary dismissal as to count II of his complaint is a final and appealable order, which brings before the reviewing court all other orders and rulings directly associated with that judgment, including, in this case, the denial of summary judgment. This court, therefore, has jurisdiction to consider the appeals.

We now turn our attention to the appeal and cross-appeal before this court. The Village contends in its appeal that the trial court erred in denying the Village's motion for summary judgment with respect to count II,

the retaliatory discharge claim. The Village presents two arguments in support of its claim that the trial court erred. First, the Village argues that the record clearly shows that DePluzer made false representations on his employment application form which, if known by the Village, would have been grounds for dismissal. The Village then cites a number of cases for the proposition that misrepresentations made on an employment application, even when discovered after the employee has already been terminated, provide a legitimate basis for termination which makes the actual reason for termination immaterial. (See *Bonger v. American Water Works* (D. Colo. 1992), 789 F. Supp. 1102; *Churchman v. Pinkerton's, Inc.* (D. Kan. 1991) 756 F. Supp. 515; *Oak Lawn v. Human Rights Comm'n* (1988), 133 Ill. App. 3d 221, 224, 478 N.E.2d 1115.) In other words, whenever an employee has made misrepresentations on his employment application, that employee is subject to being terminated for cause. If the employee is later terminated, the termination will be upheld, even if the termination might otherwise be shown to be improper, discriminatory or pretextual. Because the trial court, in granting summary judgment on count I of the complaint, found that DePluzer made false representations on his employment application, the Village contends that summary judgment should have been granted on the retaliatory discharge claim as well.

In the alternative, the Village argues that summary judgment should have been granted on count II of the complaint because DePluzer failed to show any causal link between his filing of a workers' compensation claim and his termination. The Village provided affidavits which indicated that the persons who decided to terminate DePluzer's employment were unaware that DePluzer filed, or even intended to file, a workers' compensation claim. Thus, the

Village argues, there is no evidence that the termination was motivated by DePluzer's exercise of his rights under the Act. Rather, the Village contends that the evidence supports the finding that the decision to terminate DePluzer was based solely upon DePluzer's refusal to comply with the safety precautions he was ordered to utilize.

DePluzer has filed no response to the Village's appeal. Instead, DePluzer merely presents argument on the issue he raises in his cross-appeal, *i.e.*, whether the trial court erred by granting summary judgment in the Village's favor with respect to count I of the amended complaint, which alleged breach of employment contract. On this issue DePluzer argues only that summary judgment was erroneously granted because the trial court wrongly determined that he had lied on his employment application. He argues that a genuine issue of material fact exists as to whether or not he actually made factual misrepresentations on his employment application.

Having reviewed the case law, it seems clear that material misrepresentations made on an employment application constitute a breach of contract by the employee which justifies termination such that any subsequent termination, even if wrongful, improper, discriminatory or done in retaliation of the employee's exercise of his rights, would be upheld. Thus, if the trial court's determination that DePluzer made material misrepresentations on his employment application was proper, *both* the breach of contract and the retaliatory discharge claims must fail and the trial court should have granted summary judgment on both counts. Due to this situation, we find it necessary to review the evidence presented regarding DePluzer's employment application to determine whether we can state, as a matter of law, that material misrepresentations were made in DePluzer's application to the Village.

The employment application completed by DePluzer asked, "Have you even been convicted as an adult for a criminal violation?" DePluzer responded, "No" and put "N/A" after the follow-up question asking for the nature of the offense and place of occurrence. DePluzer also stated, "None" under the section heading "Conviction Information." The Village now claims that this was a false statement because DePluzer, in his evidence deposition, testified that he had been convicted of shoplifting in 1976.

However, DePluzer also testified during his deposition that he did not include information concerning this conviction on his application because, although he had been found guilty of taking a $2.99 pair of gloves, he subsequently had the conviction expunged from his record and did not believe that he was required to acknowledge this conviction.

The second alleged falsehood contained in the application deals with his employment history. On the application DePluzer indicated that his last employer was Vulcan Industrial Packaging Ltd. (Vulcan), which is located in Toronto, Canada. The reason he gave for leaving their employ was "resigned and immigrated to the U.S.A." However, when DePluzer was questioned regarding this previous employer at his deposition he indicated that he had been terminated, attended school for several months and then immigrated to the United States. When asked to explain, DePluzer testified that he had difficulties with Vulcan because he had refused to work in certain areas due to the working conditions. He reported Vulcan to the Canadian Department of Labor, which apparently prompted one of Vulcan's supervisors to physically attack DePluzer. DePluzer was subsequently fired. In response, however, DePluzer filed a grievance with the union and the Department of Labor. As a result, he reached a set-

tlement with Vulcan whereby he was allowed to resign, rather than be terminated and he was compensated for the attack by his supervisor.

It is the Village's contention that the above evidence clearly indicates that DePluzer intentionally made material misrepresentations on his application when he answered questions indicating that he had no convictions and that he had resigned from his last employment position. DePluzer disagrees and contends that, in light of the above evidence, the question of whether he actually listed false information on his application was one of fact for a jury to determine. For this reason alone, he concludes that summary judgment was improperly granted on count I of his complaint (breach of employment contract).

We find that we must agree with DePluzer's argument that his deposition testimony, taken as a whole, raises a question of material fact on the issue of whether he lied on his employment application. One does not invariably reach the conclusion that the answers provided by DePluzer were false. (See *Hugo v. Tomaszewski* (1987), 155 Ill. App. 3d 906, 910, 508 N.E.2d 1139, 1142, where fair-minded people could draw different inferences from the facts presented, the issue should be submitted to the trier of fact.) Therefore, we do not believe that we can say, as a matter of law, that DePluzer made material misrepresentations on his employment application. Just as the issue of an employer's motive or intent is an issue of material fact not subject to summary judgment (*Jones v. Burkart Foam, Inc.* (1992), 231 Ill. App. 3d 500, 596 N.E.2d 882), so, too, is the question of whether DePluzer made material misrepresentations on the application under the circumstances presented here. While it is undoubtedly true that an employer would be interested in knowing the employment information that DePluzer testified to, DePluzer may

have been entitled to withhold such information under the circumstances, so that his statements on his employment application may not have constituted falsehoods. Consequently, we believe that the trial court erred in deciding that DePluzer lied on his employment application.

Nevertheless, even though we agree with DePluzer on his one argument, we uphold the trial court's grant of summary judgment on count I, the breach of employment contract claim, on other grounds. We do so on the basis that DePluzer failed to show that the Village's employee handbook created enforceable contractual rights which took him outside the realm of an at-will employee who could be terminated without any cause or reason.

In the trial court DePluzer contended that the Village's handbook created an employment contract pursuant to *Duldulao v. St. Mary of Nazareth Hospital Center* (1987), 115 Ill. 2d 482, 505 N.E.2d 314. The language in the handbook, quoted by DePluzer and relied upon to show a contract for permanent employment, terminable only for cause, is as follows:

> "*YOU* make your job security. The Village of Winnetka assures you of your position with the Village so long as you perform the requirements of your position satisfactorily. You may, however, be removed from your position for justifiable reasons."

However, DePluzer did not show that the handbook set forth any specific disciplinary procedures that the Village was required to follow before dismissal could be had. Therefore, in accordance with the reasoning of *Tolbert v. St. Francis Extended Care Center* (1989), 189 Ill. App. 3d 503, 545 N.E.2d 384 and *Bjorn v. Associated Regional & University Pathologists, Inc.* (1990), 208 Ill. App. 3d 505, 567 N.E.2d 417, there was insufficient evidence to show that the Village's handbook created an enforceable

contract sufficient to overcome the presumption that the employment relationship was terminable at will. For this reason, DePluzer failed to make out a claim for breach of employment contract and summary judgment was properly granted on count I of the complaint.

We now turn our attention to the Village's appeal with regard to count II. On this matter, we believe that the trial court erred in denying summary judgment in the Village's favor on the retaliatory discharge claim.

DePluzer claimed in count II of his amended complaint that he was terminated by the Village in retaliation for the exercise of his rights under the Workers' Compensation Act. In order to establish a claim of retaliatory discharge of this sort, a plaintiff must show that he was an employee before he received injury, that he exercised his rights in accordance with the Act, that he was discharged and that the discharge was causally related to the exercise of his rights. (*Miller v. J.M. Jones Co.* (1992), 225 Ill. App. 3d 799, 803, 587 N.E.2d 654.) In this case DePluzer failed to show any link between his termination and his workers' compensation claim.

First of all, prior to his filing of the workers' compensation claim, DePluzer was suspended twice for failure to abide by the safety regulations imposed by management. Furthermore, DePluzer was informed that his continued failure to comply with the safety measures would result in his termination. Lastly, DePluzer filed his compensation claim on the same day that he was terminated and his supervisors filed affidavits which indicated that they were unaware that a claim had been filed when they terminated DePluzer. Consequently, we find no evidence that the valid and lawful reason given for DePluzer's termination was merely a pretext to obscure the fact that DePluzer

was discharged in retaliation for filing a compensation claim. As stated in *Miller v. J.M. Jones Co.*, 225 Ill. App. 3d at 808, the issue in these cases is not whether the employer treated the employee fairly, but whether the discharge was in retaliation for filing a workers' compensation claim. We believe, therefore, that summary judgment in favor of the Village should have been granted on count II of DePluzer's complaint and that the trial court erred when it denied the Village's motion for summary judgment and granted DePluzer's motion for voluntary dismissal.

For the reasons stated above, we affirm that portion of the trial court's order which granted summary judgment in favor of the Village on count I. We reverse that portion of the order which denied the Village's motion for summary judgment on count II and granted DePluzer's motion for voluntary dismissal, and we remand to the trial court so that summary judgment may be entered in the Village's favor on count II.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GORDON and COUSINS, JR., JJ., concur.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NORMAN DEPLUZER,	)	
	)	
Plaintiff-Appellee and Cross-Appellant,	)	
	)	
v.	)	No. 1-93-1430
	)	
THE VILLAGE OF WINNETKA,	)	
	)	
Defendant-Appellant and Cross-Appellee.	)	

ORDER

Plaintiff-Appellee's petition for rehearing is denied.

/s/ James C. Murray
Presiding Justice

/s/ Joseph Gordon
Justice

/s/ William Cousins, Jr.
Justice

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 6, 1994

No. 77952—Norman DePluzer, petitioner, v. Village of Winnetka, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 28, 1994.